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Supreme Court of the United States

No. 73 of October Term, 1936.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Appellant*,

vs.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

REPLY TO THE SUGGESTION OF COUNSEL FOR GUYANDOT AND TUG RIVER RAILROAD COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY THAT THE CASE HAS BECOME MOOT.

HERBERT FITZPATRICK,
ROBT. B. TUNSTALL,
THOMAS L. PRESTON,
Attorneys for The Chesapeake and Ohio Railway Company.

LEWIS PRINTING CO., INC., RICHMOND, VA.

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THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Appellant*,

vs.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

REPLY TO THE SUGGESTION OF COUNSEL FOR GUYANDOT AND TUG RIVER RAILROAD COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY THAT THE CASE HAS BECOME MOOT.

This suit was brought to enjoin the construction and operation of a new line of railroad. The Norfolk and Western Railway Company and the Guyandot and Tug

River Railroad Company (hereinafter together referred to as the "Norfolk"), have filed herein a paper entitled "Railway Construction Since Case Was Heard in the District Court". The paper is not otherwise characterized or described; but an examination of it reveals that it sets up a number of matters of fact not appearing in the record, many if not most of which indeed are alleged to have occurred since the case was submitted to the court below, which are adduced to show that "a change in the status has occurred since the case was presented in the District Court". No motion is made or submitted, but the question is asked: "Has the case become moot or inappropriate by the changed conditions for the exercise of the equitable power of the District Court?" (p. 2). No other question is raised, and we take it that no other is involved; nor has any similar question been raised by the United States or the Interstate Commerce Commission.

We shall refer to this paper, for the sake of convenience, as the "Norfolk's Suggestion". Its filing sharply draws attention to the unsatisfactory situation almost inevitably called into being by an informal presentation of matters of fact *dehors* the record. We raise no objection by reason of the fact that the statement is not sworn to, the fact of its being made by counsel obviating question in this regard. But since the principal factual support for the suggestion that the case has become moot is found in the assertion that the line is now more than 60% completed at a cost, as of October 20, 1930, of $1,695,000, appellant would obviously desire, and we conceive that it would be entitled to, the opportunity (1) to ascertain by cross-examination and thereby to lay before the Court (a) the reasons for such an expenditure while there is pending the question of the legality of its purposes, and

(b) if the order of the Commission is urged in justification, the reasons why no modification of that order was sought; and (2) itself to introduce evidence that would throw light upon those questions. The Norfolk's maneuver has deprived appellant of the first of these desired opportunities; as to the second, no recourse remains except the undesirable one, not sought but forced upon appellant, of going outside the record in turn to supplement the Norfolk's statement with such facts as are necessary completely to present the situation.

In the first place, there has been no change in the situation since the case was heard in the District Court except a quantitative one. The case was heard, argued, and submitted on January 3, 1929. But the Norfolk itself says in its Suggestion that construction work began prior to January 1, 1929; and, moreover, as counsel signing this Reply are informed (in response to inquiries instituted since the Norfolk's Suggestion was filed), the facts are that requests for bids were issued by the Norfolk under date of November 10, 1928, returnable November 27, 1928; that actual construction began on December 10, 1928; and that prior to the hearing in the District Court approximately 3% of the grading had been completed from Wharncliffe to the top of the mountain between that point and Gilbert, and excavation begun at or near the Gilbert end of the line.* The Norfolk offered no proof in the District Court of this commencement and prosecution of construction, but seeks now, for the first time, to procure the consideration of facts extraneous to the record, some of which were available to it and peculiarly

*The Norfolk's suggestion asserts, as to the Itmann-Gilbert line of the Virginian, that as of October 20, 1930, the line had been 50% completed at a cost of $2,300,000 (pp. 4-5). This partial construction of the Virginian's new line is without significance here, because the authority for that line is not sought to be enjoined.

within its knowledge at the time of the hearing below, and the remainder of which do no more than indicate a continuation since the hearing of a course of conduct then already begun. Without questioning the propriety of submitting to an appellate court evidence of such a change of conditions since a trial below as would render moot the question involved, we deny the right of the Norfolk here to raise points based upon facts necessarily known to it at the hearing, but not proved, and facts occurring since the hearing which merely show the continuation of a construction program then already in progress. The silence on this point of the United States and the Interstate Commerce Commission is significant.

Aside from this, however, the facts that construction of the line is not completed and that, not construction alone, but operation as well is herein sought to be enjoined (R. 15-16), preclude the possibility that the case has become moot.

The recent decision of this Court in *Texas, etc., Railroad Company* v. *The Northside Belt Railway Company* (1928), 276 U. S. 475, is so perfectly in point as to excite wonder that the Norfolk should have filed its Suggestion. That suit was instituted to prevent construction and operation of a line of railway. It appeared that prior to institution of the suit land for the right of way had been condemned, compensation awarded and paid, and the company put in possession of the land. Before process was served, the line had been partially completed. But at the time of the hearing, construction had not been completed and operation had not begun (pp. 477-8).

The District Court dismissed the bill upon the merits. The history of the case upon appeal to the Circuit Court of Appeals is described in the opinion of this Court as follows (p. 478):

"The Circuit Court of Appeals affirmed the decree of the District Court, without passing upon the merits of the case. It held that the cause had become moot, because 'the only relief prayed for was action by the court restraining the doing of things which have been done since the suit was brought.' This conclusion was based on its own finding that 'before the decree appealed from was entered, a judgment condemning said land was rendered in said condemnation suit, and appellee had constructed its railroad over said land and was operating the same.' 16 F. (2d) 782. This Court granted a writ of certiorari. 274 U. S. 734."

Disapproving the finding of the Circuit Court of Appeals, this Court said (pp. 478-9):

"The finding of fact upon which the Court of Appeals rested its judgment was clearly erroneous. There is no basis in the record for the finding that the railroad was in operation. The part of the railroad over the plaintiff's land had been constructed; but the railroad had not been completed. No part of it had been operated; and apparently it was physically impossible to operate it in interstate commerce until completed. Paragraph 20 of Sec. 402 specifically provides that unauthorized operation as well as construction may be enjoined. *Moreover, the facts erroneously found would not, if true, have rendered the case moot. For where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the acts sought to be enjoined, the court may, by mandatory injunction, compel a restoration of the status quo. Tucker* v. *Howard*, 128 Mass. 361, 363; *Town of Platteville* v. *Galena & Southern Wisconsin R. R. Co.*, 43 Wis. 493, 506-507" (Italics ours).

This decision is in line with the prior holdings of this Court in *Mills* v. *Green* (1895), 159 U. S. 651, 654, and *Southern Pac. Terminal Co.* v. *Interstate Commerce Commission* (1911), 219 U. S. 498, 514.

The doctrine of moot cases, being grounded upon the rule that the court will not do a vain thing, is so utterly inapplicable here that it is not surprising that the Norfolk refrains from arguing the point and is content merely to suggest the question as a *point d'appui* for a statement of facts extraneous to the record and foreign to this case as submitted to the court below. Their importation into the case, under circumstances of such palpable irrelevancy, cannot, whatever its purpose, influence the decision on the merits. The private right asserted by the appellant herein is parallel with, and in that sense representative of, the right of the public under the Transportation Act of 1920 to protection from the construction and operation of unnecessary, uneconomical and wasteful railroad facilities. Clearly the fact that, of the $2,500,000 which the Gilbert-Wharncliffe line will cost when completed $1,695,000 have been expended pending this appeal, cannot modify the considerations of public right and policy which underlie appellant's suit.

Certain questions, however, may ultimately arise from these considerations which are not presented upon this record, but which inevitably come to mind as the only possible result of the thrusting of the Norfolk's Suggestion upon the Court's attention. Ready answer being at hand, appellant prefers not to leave the *quæres* outstanding. The wrong to the public committed by this construction is not confined to the saddling upon it of the initial cost of construction. The expenditure of $2,500,000, stated to be the cost of the line, necessarily leads to fixed charges by way of interest and taxes. The record

further shows that operation over the Gilbert-Wharncliffe line is possible only at a cost exceeding by 90 cents a car the cost of operation over appellant's wholly adequate Logan Subdivision (R. 43). Can the Norfolk by expending $1,695,000, during the progress of a suit brought to enjoin its authority so to do, justify the further ultimate imposition upon the public of the remainder of the initial cost, together with the continuing fixed charges incident thereto, and the continuing loss involved in supporting the unnecessary and wasteful operation of the line? The question itself at once suggests a negative answer. It exposes the effort of the Norfolk in this connection as an invitation to the Court to throw the public's good money after the Norfolk's bad. And if it be suggested that the funds already expended must themselves ultimately be drawn from the public, we reply that it is a question committed to the Interstate Commerce Commission whether expenditures upon construction pending a suit to enjoin that construction are made under such efficient and economical management as to warrant their capitalization against the public by their inclusion in determining the base either for rate-making or recapture purposes (Interstate Commerce Act, Sec. 15a). In any event, the wrong complained of is not consummated, but merely begun; and the consequence is clear that this case deserves disposition upon its merits in the light of the facts shown by the record, and no others.

We would notice briefly, in conclusion (1) the statement of the Norfolk that it could not have done otherwise than proceed with construction if its rights under the Commission's Order were to be preserved, and (2) the intimation, apparently though indirectly conveyed by the

Suggestion, that appellant has not diligently pursued the legal remedies open to it.

(1) The basis of the Norfolk's statement that it could not do otherwise than it did lies in the provision of the Commission's order that work should begin on or before January 1, 1929, and be completed on or before December 31, 1931. This provision is advanced to the end that compulsion be made to justify an otherwise unwarranted disregard of the pendency of this suit. But the force of the position disappears in the light of the fact that this suit was instituted on December 8, 1928, twenty-three days before the certificate required commencement of the work. An application to the Commission, during that period, for extension of the time for commencement and, if necessary, for completion of the project, would surely have been granted, in view of the pendency of this suit, as the veriest *pro forma* affair. Without having taken this simple measure to preserve the certificate in full force and virtue with due regard to and respect for judicial process, it does not lie in the mouth of the Norfolk to say that it could not have done otherwise than it did. In the absence of any effort to be relieved of the necessity which it now pleads in justification, it must lie upon the bed it has made.

(2) The intimation that appellant has been wanting in diligence in pursuing the available legal remedies is contained in the following paragraph of the Suggestion (p. 2):

> "This case was heard, argued and submitted in the District Court January 2, 1929, and submitted to that Court by agreement of all the parties by Counsel 'for its decision as on final hearing': R. p. 80. The prayer of the petition of the Chesapeake Company for a preliminary injunction was thus aban-

doned, and no interlocutory order and injunction *pendente lite* or *supersedeas* was allowed."

In reply, appellant would point out that this suit to set aside an order of the Commission issued November 1, 1928, was instituted by petition filed December 8, 1928, wherein an interlocutory, as well as a permanent, injunction was prayed for; that no expedition could have resulted from seeking a temporary restraining order because under the District Court Jurisdiction Act, U. S. C. A., Title 28, Sec. 47, 38 Stat. L. 220, three days' notice of hearing before a three-judge court would have been requisite, as compared with five days' notice required in connection with the prayer for an interlocutory injunction—a saving of but two days, and of no consequence in view of the time necessarily to be consumed in convening the court—; and that appellant could not have obtained a temporary restraining order if prayed for, because of the findings as to irreparable damage required by the Act—that is to say, the injury to appellant here would not have been occasioned by the *beginning* of the construction, but only by its completion and the subsequent operation of the line. Submission as on final hearing merely precluded introduction of further testimony, waived nothing, and should have made rather for than against expedition in the disposal of the suit. A stay pending appeal from the final decree of the District Court refusing the injunction was precluded by the requirements of the law as to the degree of injury, and other special reasons requisite to be shown, *Virginian Ry. Co.* v. *United States* (1926), 272 U. S. 658, 673, as well as by the fact that no affirmative action by appellant to its own irreparable injury was required as a result of the decree, as was the case in *Virginian Ry. Co. v. United*

States, supra; Louisville & Nashville R. Co. v. *United States* (D. C.), 227 F. 273, Id., 242 U. S. 60; *Central R. R. of New Jersey* v. *United States*, 257 U. S. 247; *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 412, and *Beaumont etc. Ry. Co.* v. *United States* (1930), 51 Sup. Ct. 1, where stays were granted by the District Court. Finally, no supersedeas was proper because the decree dismissed the bill and there was nothing to supersede. *Cumberland Tel. Co.* v. *Pub. Serv. Comm.* (1922), 260 U. S. 212, 215.

The foregoing, by disposing of the supposed omissions mentioned by the Norfolk, demonstrates that appellant has expeditiously pursued every legal remedy open to it. Those things which the Norfolk points to as left undone could not properly have been done. Furthermore, appellant did not stop with merely invoking its legal remedies. On December 8, 1928, the day this suit was instituted, it came to appellant's notice through the press that a contract for construction of the line had been awarded. On December 10, 1928, appellant mailed to the contractor a copy of its petition herein together with notice of the pendency of this suit, wherein it was stated that the suit was brought to set aside as void the Commission's authorization of the line and that, "in the view which we take of the law any contract or contracts for this construction are, for the reasons stated in the petition, likewise unlawful and void". A copy of this notice was mailed to the Norfolk. (See Appendix). It is thus abundantly clear that appellant has done all that it lawfully could do in the premises.

The extended progress of this construction in the face of the pendency of this suit seeking to set aside the only authority under which it could lawfully have been undertaken is due neither to delay on the part of appellant

nor to appellant's failure to pursue any effective remedy open to it, but is, on the contrary, to be accounted for by two things alone—the willingness of the Norfolk to risk a decision unfavorable to it, and the delay of ten months by the District Court in deciding the case. It is respectfully submitted that these circumstances, together with the abundant scope for operation of a judgment of this Court reversing the decree of the court below, dispose of the suggestion that the case has become moot and clearly entitle appellant to a decision upon the merits of the controversy in the light of the facts properly proved and shown by the record.

Respectfully submitted,

HERBERT FITZPATRICK,
ROBT. B. TUNSTALL,
THOMAS L. PRESTON,
Attorneys for The Chesapeake and Ohio Railway Company.

APPENDIX.

Richmond, Virginia,
December 10, 1928.

Messrs. W. W. Boxley & Company
and W. W. Boxley,
Roanoke, Virginia.

Dear Sirs:

You are hereby notified that on Saturday, December 8, 1928, the undersigned filed in the Clerk's Office of the District Court of the United States for the Southern District of West Virginia, a petition in equity against the United States of America, the Guyandot and Tug River Railroad Company, and the Norfolk and Western Railway Company, looking to the setting aside and annulling, to the extent set forth in the petition, of a certain certificate and orders of the Interstate Commerce Commission authorizing the construction by the Guyandot and Tug River Railroad Company of a line of railway between Wharncliffe, West Virginia, and Gilbert, West Virginia, and also seeking to enjoin the Guyandot and Tug River Railroad Company and the Norfolk and Western Railway Company from proceeding with that construction.

There is attached hereto a printed copy of the petition aforesaid, with the accompanying exhibits, from which you may see that it is the contention of the undersigned that the certificate and orders so entered by the Interstate Commerce Commission are void in so far as they authorize, or purport to authorize, the construction of this line of railroad. In the view which we take of the law any contract or contracts for this construction

are, for the reasons stated in the petition, likewise unlawful and void.

In the CHARLESTON DAILY MAIL published on the afternoon of Saturday, December 8, 1928, there appeared an article stating that the firm of W. W. Boxley & Company had been awarded a contract for the construction of this line of railroad, and in view of this fact we deem it proper to give this notice to the end that if this newspaper report be correct you may be fully advised as to the existing situation before proceeding further under the contract.

Respectfully,

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

By R. S. MARSHALL,
Vice-President.

ROBT. B. TUNSTALL,
Of Counsel.

REGISTERED MAIL.

December 10, 1928. T/b

The Chesapeake and Ohio Railway Company v. *United States of America, Guyandot and Tug River Railroad Company, and Norfolk and Western Railway Company.*

Mr. W. W. Boxley,
Boxley Building,
Roanoke, Virginia.

My dear Mr. Boxley:

I am enclosing a notice to you and the firm of W. W. Boxley & Company, which explains itself. As I have written Mr. Reath today, I regret the necessity that has compelled this Company to take this proceeding, but in the view which we take of the law, and in the light of the very great interest of this Company in the situation, no other course seems possible, and it has seemed to me at once the courteous and proper thing to advise you as promptly as possible as to the existing situation.

Very truly yours,

ROBT. B. TUNSTALL,
Assistant General Counsel.

Cc to—
Mr. Theodore W. Reath,
With copy of notice.

December 10, 1928. T/b

The Chesapeake and Ohio Railway Company v. *United States of America, Guyandot and Tug River Railroad Company, and Norfolk and Western Railway Company.*

Mr. Theodore W. Reath,
General Counsel, Norfolk & Western Ry. Co.,
1201 Commercial Trust Building,
Philadelphia, Pennsylvania.

My dear Mr. Reath:

I am handing you herewith four printed copies of a petition in equity, with the accompanying exhibits, filed by The Chesapeake and Ohio Railway Company on Saturday last, December 8th, in the Clerk's Office of the United States District Court for the Southern District of West Virginia. We also, in accordance with the provisions of the Urgent Deficiencies Act, presented the petition to the Judge, and the letter to him of which I am enclosing a copy was written in accordance with his request that other copies of the petition be sent to him, so that he might be able to send them to such other judges as he might associate with him in pursuance of the terms of the Act.

I am also sending you copies of a letter and notice, which are self-explanatory, which I am sending to Mr. W. W. Boxley and W. W. Boxley & Company.

The petition and exhibits are self-explanatory, but I am particularly requested by Mr. Harahan to say on behalf of our management, and I wish to say on my own behalf, that we regret the necessity of taking this proceeding, but in the view which we take of the law and

the very important interest of this Company in the situation, no other course is possible.

I should like to add that if there is any way consistent with the prompt presentation and disposition of the matter—the question of the time of hearing is of course not within our control—in which we can reasonably serve your convenience in connection with the presentation of the matter I shall be only too happy to co-operate to that end. When we presented the petition to the Judge he said that he did not think it would be possible, in view of pre-existing engagements on his part and on the part of such judges as he might associate with him, for the case to be heard before the end of the year, and that ordinarily the most available opportunity for constituting a statutory court was presented by the meeting of the Circuit Court of Appeals for this Circuit, which is to convene, as I understand, on or about January 10th next. Judge McClintic apprehended that it might be possible for this case to be heard shortly before or during that term of the Circuit Court of Appeals, and he indicated that Richmond might be the most convenient place for the hearing. While of course not presuming to speak for you, I said the obvious thing that I imagined that Richmond would be a more convenient place for the hearing for all the parties to the cause.

I understood that the Judge would advise me further after he had taken the matter up, and I shall promptly advise you further upon hearing from him. If there is anything that I can do in the meantime to facilitate your consideration of it, as by sending additional copies of the petition, I will be glad to do so.

Very truly yours,

ROBT. B. TUNSTALL,
Assistant General Counsel.